Perwira Affin Bank Bhd (dahulu dikenali sebagai Perwira Habib Bank (M) Bhd) v JCM Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D5-22-705 OF 1993
KAMALANATHAN RATNAM J
15 AUGUST 1998

Companies and Corporations *— Debenture — Charging of penalty interest — Whether plaintiff could capitalize interest and charge penalty interest — Whether certificate of indebtedness is final and conclusive evidence against defendant*

Companies and Corporations *— Debenture — Signatory to — Whether guarantor must be signatory to debenture*

Contract *— Variation — Whether there was agreement to variation — Whether assignment of rights to collect debt due amount to variance of terms of lending transactions*

The plaintiff provided financial assistance to the first defendant to undertake the project for Esso Production (M) Inc ('Esso') secured by three deeds of debenture and joint and several guarantees executed by all directors of the first defendant, including the third defendant. The plaintiff's claim against the third defendant was for the total sum arising out of the credit facilities with interest and costs. The third defendant submitted, inter alia, that: (i) the plaintiff could not capitalize interest and charge a penalty interest; (ii) he was not a signatory to the debenture; (iii) the plaintiff had not utilized his own services and that if this had been done, he would have ensured that the optimum sum would have been negotiated with Esso to settle the outstanding debts; and (iv) there has been a variation in the agreement for discharge.

Held, allowing the plaintiff's claim:

(1) Pursuant to the clauses in the debenture, the plaintiff was entitled to capitalize and charge penalty interest. Moreover, based on authority, bankers can either capitalize interest or compound it. In any event, the certificate of indebtedness had been issued and signed by the plaintiff's officer and this was final and conclusive evidence against the third defendant. This was expressly provided by cl 9 of the guarantee signed by the third defendant (see p 665D–E).

(2) Unless the third defendant was authorized by resolutions to execute the debenture or any other security document to be given in response to a letter of offer, certainly the third defendant would not be a signatory. The submission was unmeritorious based on the fact that the third defendant had executed all joint and several guarantees being part of the required security documents to be executed pursuant to the letters of offer (see p 665G).

(3) The court accepted the evidence that the receivers had had various meetings with the first defendant during the negotiations with Esso so that the receivers could obtain the maximum claim for the first defendant from Esso. The court also accepted the evidence that the receivers had worked independently of the first defendant. Therefore, the court was satisfied that the maximum sum had been obtained from Esso after the negotiations (see p 666B–C)

(4) There had not been any change to the terms of the facility utilized by the first defendant. Besides, there had been no evidence presented by the third defendant to show to the court's satisfaction that there had indeed been any variance of any of the terms. The assignment of the rights to collect a debt due from Esso to the plaintiff did not amount to variance of any of the terms of the lending transactions. The letters of offer containing the terms of contract and the deeds of debenture remained unchanged. Therefore, there had been no variance (see p 666F–G).

[Bahasa Malaysia summary

Plaintif telah memberikan bantuan kewangan kepada defendan pertama untuk menjalankan projek untuk Esso Production (M) Inc ('Esso') yang dijamin oleh tiga suratikatan debentur dan gerenti-gerenti bersesama dan berasingan yang telah disempurnakan oleh kesemua pengarah-pengarah defendan pertama, termasuk defendan ketiga. Tuntutan plaintif terhadap defendan ketiga adalah untuk keseluruhan jumlah yang berbangkit daripada kemudahan-kemudahan kredit tersebut berserta kos dan faedah. Defendan ketiga berhujah, antara lainnya, bahawa: (i) plaintif tidak dapat mempermodalkan faedah dan mengenakan faedah penalti; (ii) beliau bukannya merupakan seorang penandatangan kepada debentur tersebut; (iii) plaintif telah tidak menggunakan perkhidmatannya sendiri dan bahawa sekiranya perkara ini telah dilakukan, beliau tentunya telah memastikan bahawa jumlah yang optimum pasti telah dirundingkan dengan Esso bagi menjelaskan hutang yang masih belum dijelaskan itu; dan (iv) terdapat perubahan dalam perjanjian untuk pelepasan.

Diputuskan, membenarkan tuntutan plaintif:

(1) Selaras dengan fasal-fasal dalam debentur tersebut, plaintif berhak untuk mempermodalkan dan mengenakan faedah penalti. Lagipun, berdasarkan autoriti, juru-jurubank boleh sama ada mempermodalkan faedah atau mengkompaunkannya. Dalam sebarang keadaan, perakuan keterhutangan telahpun dikeluarkan dan ditandatangani oleh pegawai plaintif dan ini merupakan keterangan yang terakhir dan muktamad terhadap defendan ketiga. Ini telah secara nyatanya diperuntukan oleh fasal 9 gerenti tersebut yang telah ditandatangani oleh defendan ketiga (lihat ms 665D–E).

(2) Melainkan defendan ketiga diberi kuasa melalui resolusi untuk menyempurnakan debentur tersebut atau mana-mana dokumen jaminan yang lain supaya diberikan sebagai jawapan kepada satu surat tawaran, sudah tentu defendan ketiga tersebut bukannya merupakan seorang penandatangan. Penghujahan tersebut adalah tidak bermerit berdasarkan fakta bahawa defendan ketiga telah menyempurnakan kesemua gerenti-gerenti bersesama dan berasingan sebagai sebahagian daripada dokumen-dokumen jaminan yang dikehendaki supaya disempurnakan selaras dengan surat tawaran tersebut (lihat ms 665G).

(3) Mahkamah telah menerima keterangan bahawa penerima-penerima telah mengadakan beberapa perjumpaan dengan defendan pertama ketika perundingan-perundingan dengan Esso supaya penerima-penerima tersebut boleh mendapatkan tuntutan yang maksima untuk defendan pertama daripada Esso. Mahkamah juga menerima keterangan bahawa penerima-penerima tersebut telah bekerja secara bebas dari defendan pertama. Dengan itu, mahkamah berpuas hati bahawa jumlah maksima telah diperolehi daripada Esso selepas perundingan tersebut (lihat ms 666B–C).

(4) Tidak terdapat sebarang perubahan kepada terma-terma kemudahan yang telah digunakan oleh defendan pertama. Lagipun, tidak terdapat sebarang keterangan yang dikemukakan oleh defendan ketiga bagi ditunjukkan demi kepuasan mahkamah bahawa sesungguhnya telah terdapat sebarang perubahan kepada mana-mana dari terma-terma tersebut. Penyerahhakan hak untuk mengutip hutang yang kena dibayar oleh Esso kepada plaintif tidak membawa kepada sebarang perubahan akan mana-mana dari terma-terma transaksi meminjam itu. Surat-surat tawaran yang mengandungi terma-terma kontrak tersebut dan suratikatan debentur kekal tidak berubah. Dengan itu, tidak berlaku sebarang perubahan (lihat ms 666F–G).]

Notes

For cases on debenture, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 69–76.

For cases on variation, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3156–3163.

Cases referred to

Bumiputra Merchant Bankers Bhd v Meng Kuang Properties Bhd [1991] 1 CLJ 718 (refd)

National Bank of Greece SA v Pinios Shipping Co No 1 & Anor; The Maira [1990] 1 All ER 78 (refd)

Reddie v Williamson (1863) 1 Macph (Ct of Sess) 228 (refd)

Legislation referred to

Companies Act 1965 Form 63
Contracts Act 1950 s 86

Manjit Singh Sachdev (*Mohammad Radzi bin Abdul Hamid* and *Rajesh Kumar GN Sharma* with him) (*Manjit Singh Sachdev Mohammad Radzi & Partners*) for the plaintiff.

Kumar K Karthigesu (*Kumar Karthigesu & Co*) for the third defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

The plaintiff provided financial assistance to the first defendant for a total sum of RM39,374,890 principally to undertake the slugcatcher project for Esso Production Malaysia Inc ('Esso') at Kerteh, Kuala Terengganu.

The plaintiff had by way of three letters of offer dated 30 July 1990, 8 February 1991 and 11 April 1991 granted credit facilities to the first defendant. In respect of the letter of offer dated 30 July 1990 ('the first offer') being a facility for RM30.4m, the following security documents were executed:

(a) deed of debenture dated 2 August 1990;

(b) advance against agreement and deed of assignment dated 20 August 1990;

(c) joint and several guarantees dated 6 August 1990 and executed by all directors; namely, the second, third, fourth, fifth and sixth directors of the first defendant.

In respect of the letter of offer dated 8 February 1991 ('the second offer') being a facility for RM5m, the following security documents were executed:

(a) additional deed of debenture dated 6 April 1991; and

(b) joint and several guarantees dated 6 April 1991 for RM5m signed by all the directors of the first defendant.

In respect of the letter of offer dated 11 April 1991 ('the third offer') being a facility for RM3,974,890, the following security documents were executed:

(a) additional debenture dated 21 May 1991 by the first defendant;

(b) joint and several guarantees dated 6 May 1991 by all the directors of the first defendant; and

(c) additional deed of assignment dated 21 May 1991.

It is a fact that there is no dispute relating to all these letters of offer and to the execution of the said security documents.

The plaintiff's claim

The plaintiff's claim against the third defendant is for the total sum arising out of the said three credit facilities together with interest amounting to RM31,022,770.55 with interest and costs.

Case for the third defendant

The third defendant was at all material times the managing director of the first defendant until a circular resolution issued by the first defendant's board of directors dated 14 May 1992. Subsequent to the third defendant's resignation as managing director, he nevertheless continued to hold 15% equitable interest in the first defendant until 18 November 1993. The first defendant was placed under receivership on 10 August 1992.

It is the case of the third defendant that the plaintiff was the payee of a settlement agreement entered into directly between the first defendant and Esso and that the settlement sum of US$5.5m was accepted by the plaintiff subsequent to the upliftment of the receivership and that since evidence was led by PW2 that the said sum of US$5.5m had been paid directly by Esso to the plaintiff there was no basis for this claim against him.

Findings of the court

The third defendant had admitted in his evidence that before his resignation on 14 May 1992 as the managing director of the first defendant, the first defendant was in financial straits. I note that on 10 August 1992 the plaintiff appointed three persons from Coopers & Lybrand as joint and several receivers and managers of the properties of the first defendant, pursuant to the powers contained in the three debentures referred to earlier. There is also no doubt that the said receivership was uplifted on 12 January 1994. The plaintiff then issued a notice of demand dated 27 May 1993 against the first defendant and all the joint and several guarantors. Consent judgment was entered against the first, second, fourth, fifth, sixth and seventh defendants on 8 December 1993 for the total outstanding sum of RM31,022,770.55 with interest accruing.

However, on 28 February 1994 a deed of assignment was signed between the plaintiff and the first defendant. The said deed of assignment referred to the total outstanding amount of RM31,022,770.55 due to the plaintiff. It also referred to the consent judgment earlier referred to. By cl 13(a) of the said deed of assignment, the first defendant agreed that if there was any deficiency in proceeds after recovery from Esso and the contractor, the first defendant would still pay and become liable for the difference between the amount due and owing and the amount so recovered together with interest at the prescribed rate.

PW2, Tan Kwe Hee, the deputy general manager of the plaintiff testified that the sum directly received from Esso which was US$5.5m and recovered on 10 January 1996 amounted to RM14,038,750. I also accept the evidence of Gong Wee Ning ('PW3') a director and partner of Coopers

& Lybrand, who were the appointed receivers of the first defendant, that the receivers had prepared all accounts under the statutory requirements under the Companies Act 1965 and that they had filed Form 63 every six months with the Registrar of Companies. Evidence was tendered, which I accept, showing all monies recovered and accounted for. I also accept the evidence of PW3 that the receivers had various meetings with the defendants' representatives during the negotiations with Esso, so that the receivers could obtain the maximum claim for the first defendant against Esso. I also accept PW3's evidence that the receivers worked independently of the first defendant. The plaintiff called one Barry A Ross as the fourth witness. He was, I find, a go-between to negotiate a settlement between Esso and the first defendant. I also accept his evidence that he had himself on several occasions met the third defendant together with the seventh defendant whilst discussing the claim against Esso.

Capitalization of interest and charging a penalty interest

The third defendant submitted that the plaintiff could not capitalize interest and charge a penalty interest. I find this submission to be flawed. Pursuant to cll 3.05, 3.06 and 3.11 of the debenture dated 2 August 1990 (referred to earlier), the plaintiff is entitled to capitalize and charge penalty interest. I also find that these identical clauses are repeated in all the three debentures given as security for the three facilities given by the plaintiff to the defendant. In *National Bank of Greece SA v Pinios Shipping Co (No 1) & Anor; The Maira* [1990] 1 All ER 78 (HL), the first respondent purchased a ship under a contract which provided that part of its purchase price would be paid by 14 six-monthly instalments secured by a first mortgage on the ship in favour of the builders. The appellant bank guaranteed the first six instalments, having secured the first respondent's liability by a second mortgage and the second respondent's by a personal guarantee. When the first respondent failed to pay any of the instalments due to the builders, the bank was called on to pay two instalments under its guarantee. The ship was subsequently lost at sea and the insurance proceeds were insufficient to enable the first respondent to repay the bank under the second mortgage. The bank made a written demand to the respondents for repayment of the amount outstanding and when they failed to pay, the bank commenced proceedings against them claiming principal and interest. The trial judge awarded the bank the amount owing plus compound interest calculated to the date of judgment. The respondents appealed against, inter alia, the award of compound interest, contending that the second mortgage contained no provision entitling the bank to charge compound interest and if it did the bank's entitlement to charge compound interest ended when the bank made its demand for repayment and thereby terminated the banker/customer relationship. The Court of Appeal allowed the appeal. The bank appealed to the House of Lords, contending, inter alia, that its entitlement to compound interest arose by virtue of an implied contractual term which arose by reason of the usage of bankers which entitled bankers to capitalize interest on a debt until payment.

A The House of Lords held that the bank was entitled to capitalize interest from the date when it demanded repayment and allowed the appeal. In *The Maira* it was argued that the second mortgage contained no provision entitling the bank to charge compound interest. However, in the case before me cll 3.5 and 3.11 specifically allow for capitalization of interest and for awarding penalty interest on excess overdraft respectively. The basis for capitalization of interest was best put by Clerk LJ of the Scottish Court in *Reddie v Williamson* (1863) 1 Macph (Ct of Sess) 228 at p 237:

> The privilege of a banker to balance the account at the end of the year, and accumulate the interest with the principal, is founded on this plain ground of equity, that the interest ought then to be paid, and, because it is not paid, the debtor becomes thenceforth debtor in the amount, as a principal sum itself bearing interest.

Within our shores, it was held in *Bumiputra Merchant Bankers Bhd v Meng Kuang Properties Bhd* [1991] 1 CLJ 718 that bankers can either capitalize interest or compound it. The court further held that capitalization of interest does not mean that interest has in fact been paid. It means that interest has in fact not been paid. It is because the interest was not paid that it is to be capitalized in the sense that the interest is converted to capital.

Finally, I also find that the certificate of indebtedness dated 3 May 1996 had been issued and signed by the plaintiff's officer and this is final and conclusive evidence against the third defendant. This is expressly provided by cl 9 of the guarantee signed by the third defendant. I need not go into the case law regarding this.

The third defendant is not a signatory to the debenture documents

This argument is baseless. The first defendant borrower is a company incorporated under the Companies Act 1965. Unless the third defendant is authorized by resolutions to execute the debenture or any other security document to be given in response to a letter of offer, certainly the third defendant would not be a signatory. This submission is unmeritorious based on the fact that the third defendant had executed all the joint and several guarantees being part of the required security documents to be executed pursuant to the letters of offer.

Question of accord and satisfaction

During cross-examination, the third defendant stated that after his examination-in-chief the plaintiff had called him up and offered to settle the claim for RM1.5m. According to the third defendant, the matter was negotiated and settled for RM1.5m. However, to subsequent questions the third defendant admitted that the plaintiff had declined the proposed settlement of RM1.5m. This submission of accord and satisfaction has floundered from the outset, since there has been no accord based on the third defendant's own admission.

Complaint of no optimum sum obtained from Esso

It is the complaint of the third defendant that the plaintiff had not utilized his own services and that if this had been done, he, the third defendant would have ensured that the optimum sum would have been negotiated with Esso to settle the outstanding debts.

On this score, I must say that I had already earlier accepted the evidence of PW3 that the receivers had had various meetings with the first defendant's representatives during the negotiations with Esso so that the receivers could obtain the maximum claim for the first defendant from Esso. I had also accepted PW3's evidence that the receivers had worked independently of the first defendant. I am therefore satisfied that the maximum sum had been obtained from Esso after negotiations.

As for the defendant's submission that there has been a breach of equitable duty of care, I find that it was never put to the plaintiff's witnesses that there was a breach of a duty of care.

Another issue raised by the third defendant was that there has been a variation in the agreement for discharge and that pursuant to s 86 of the Contracts Act 1950, such a variation between the settlement agreement and the deed of assignment dated 28 February 1994 is a variation thus discharging the liability of the surety, namely the third defendant.

Section 86 reads:

> Discharge of surety by variance in terms of contract
>
> Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

Section 86 refers to a variance in the terms of the contract between the principal debtor and the creditor. PW1, the branch manager of the plaintiff, testified that there has not been any change to the terms of the facility utilized by the first defendant. Besides, there has been no evidence presented by the third defendant to show to the court's satisfaction that there has indeed been any variance of any of the terms. It is my judgment that the assignment of the rights to collect a debt due from Esso to the plaintiff does not amount to variance of any of the terms of the lending transactions. The letters of offer containing the terms of contract remained unchanged. The deeds of debenture stayed intact. Where then is the variance?

In the circumstances, I awarded the plaintiff judgment as prayed for in the amended statement of claim dated 6 August 1999 for RM31,022,770.55 with interest and costs.

Order accordingly.

Reported by Jafisah Jaafar